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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

EDGAR H. SMITH, JR., *Petitioner,*

v.

HOWARD YEAGER, Warden, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Edgar H. Smith, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, affirming the order of the United States District Court for the District of New Jersey denying the writ of habeas corpus.

OPINION BELOW

The opinion of the Court of Appeals, Judge Biggs dissenting, is printed in the Appendix to this petition. (App. 1a). The opinion of the Court of Appeals denying the petition for rehearing, Judge Freedman dissenting, is also printed in the Appendix. (App. 21a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1968. (App. 25a). The petition for rehearing was denied on March 15, 1968. (App. 26a). On May 15, 1968, Mr. Justice Brennan extended the filing time to and including August 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under *Massiah* v. *United States*, 377 U.S. 201 (1964), a criminal trial is fatally contaminated by the introduction of a post-indictment admission that a prior transcribed confession was "accurate", when the admission was obtained under deceptive circumstances, in the absence of retained counsel, after petitioner told the police that counsel had advised him not to sign the confession? Whether *Massiah* is applicable to "final" cases, as defined by *Linkletter* v. *Walker*, 381 U.S. 618, 622 at Note 5 (1965)?

2. Under *Townsend* v. *Sain*, 372 U.S. 293 (1963), what standards govern the finding that an evidentiary hearing has been "waived", particularly as applied to statements of counsel made prior to this Court's decision in that case?

3. On the State trial record, was petitioner's confession voluntary?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The First Section of the Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTORY STATEMENT

It "needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist . . . . We must be deaf to all suggestions that a valid appeal to the Constitution . . . comes too late, because courts. including this Court, were not earlier able to enforce what the Constitution demands." *Chessman* v. *Teets,* 354 U.S. 156, 165 (1957). (Harlan, J. for the Court).

Eleven years ago, a New Jersey jury convicted petitioner, Edgar H. Smith, Jr., of the brutal murder of a young girl. Smith is now this country's longest-standing resident of Death Row. In the intervening years, substantial doubts have been raised as to his guilt,[1]

[1] Although guilt or innocence is of no concern to this Court on the merits, serious public doubt about guilt in a capital case should add to the "special and important reasons" for a hearing on the legal issues. Supreme Court Rule 19(1).

see, William F. Buckley, Jr., *The Approaching End of Edgar H. Smith, Jr.,* Esquire Magazine (November, 1965) (Reprinted at App. 27a); post-conviction litigation has been exhaustive, and this Court has denied certiorari three times. 361 U.S. 861 (1959); 376 U.S. 928 (1964) (Douglas, J. dissenting); 379 U.S. 1005 (1965).[2]

No court, however, has ever fully examined the facts of petitioner's police detention that led to and surrounded his incriminating statements. This petition presents the legal questions arising from that setting. It is not "too late . . . to enforce what the Constitution demands." *Cf. e.g., Sheppard* v. *Maxwell, cert. den. sub nom. Sheppard* v *.Ohio,* 352 U.S. 910 (1956); *cert. granted* 382 U.S. 916 (1965), *rev'd.,* 384 U.S. 333 (1966); *Rogers* v. *Richmond, cert. den. sub nom. Rogers* v. *Connecticut,* 351 U.S. 952 (1956), *cert. den.* 357 U.S. 220 (1958), *cert. granted,* 361 U.S. 959 (1960), *rev'd,* 365 U.S. 534 (1961).

STATEMENT OF THE CASE[3]

Facts Brought Out at Trial in 1957

Victoria Zielinski was found dead with a crushed skull in Mahwah, New Jersey on the morning of March 5, 1957 (T. 249-51). That evening at 11:30, after a day's investigation, the police took Edgar H. Smith, Jr., age 23, into custody. (T. 419, 669-70). Through the night and morning, there followed more than thir-

[2] A full statement of the procedural history appears at Note 1, of Judge Biggs' dissenting opinion. (App. 4a).

[3] The facts are limited to those relevant to the questions presented. Except where otherwise indicated, record references (T.) are to the printed trial testimony lodged with the Clerk of this Court.

teen hours of interrogation and other police strategies designed to elicit the Q. and A. statement Smith ultimately gave on the next afternoon. That Q. and A. and a post-indictment admission of its "accuracy" are the incriminating statements that are subject of this petition.

Although petitioner was arrested in bed, he had not slept for about 35 hours, from 8:30 on the morning of March 5th until some time after the Q. and A. statement was concluded at 3:45 p.m. the next day. (T. 673). Moreover, Smith had been ill for four days prior to his arrest, (T. 541), and during the 35-hour period he could eat only two eggs and cups of coffee. (T. 673).

During the thirteen-hour period from arrest to the beginning of the Q. and A., Smith was interrogated in relays, by more than a dozen prosecutorial and police officials. (T. 540). There is no evidence that his interrogators gave Smith warnings of any kind. On at least one occasion, the interrogation took place in the presence of newspaper reporters. (T. 420). The weather was cold, and Smith, unjacketed for the most part, shivered from time to time. (T. 540-41). And twice during the night, he was taken from the police station, for substantial but undetermined periods of time, to search for clothes he said he had discarded and to inspect the scene of the crime. (T. 420-35, 478-80, 497-98).

Early on the morning of the 6th, the police took petitioner to a doctor's office, where he was stripped in the presence of the officers and examined. (T. 482-83, 510-11). He was then brought to the prosecutor's office where his limbs were photographed, his nails were cut

and scraped; a sample of his hair was pulled; and he was disrobed and garbed in a coverall. (T. 483-85, 499, 523, 671). Interrogation by officers and prosecutors continued throughout (T. 484), and at 10 a.m. Smith broke out crying, admitted that he had been with the girl at the scene, stated that she had hit him and that he had given her a "good shot". (T. 519-23). Thereafter, he spoke with a priest for less than half an hour. (T. 751).

It is noteworthy that at this point, investigation and questioning had already yielded ample evidence for arraignment: the car with a blood-stained mat that petitioner used the night of the crime; his blood-stained shoes, socks, and trousers; and his admission that he was at the scene with the girl and had hit her. (T. 419-22, 477, 484, 499, 502, 505, 508, 601).

Nevertheless, shortly after noon, the interrogators began to elicit the Q. and A. statement. The First Assistant prosecutor conducted the interrogation in the presence of three police officers and one prospective member of the jury venire.[4] (T. 543, 551). The interrogation lasted about three hours. An oath was administered and more than 350 questions were asked. The resulting Q. and A. was admitted in evidence and read by the prosecutor to the jury. (T. 551-593). Petitioner was not arraigned until 7 o'clock that evening, about twenty hours after his arrest.

Two days later, petitioner was indicted. (T. 1). Three days after indictment (*Cf. Massiah* v. *United States,* 377 U.S. 201 (1964)), detective de Lisle visited Smith in jail and asked petitioner to read and sign

[4] The prospective juror did not serve on the venire.

the 39-page Q. and A. statement. (T. 521). Smith refused to sign the statement on the ground that he had retained a lawyer who had advised him not to sign. (A. 521, 674). Nevertheless, in the face of that refusal, de Lisle elicited from Smith an admission that the statement was "accurate", without informing Smith that his admission would serve in place of his signature to meet New Jersey's requirements for admissibility.

At trial, the evil was compounded, for Smith's "accuracy" admission, given without thought that it would have *any* legal significance, took on a new and expanded meaning that virtually guaranteed his conviction. Under New Jersey law, the acknowledgment was required for the admissibility of a prior transcribed confession in order to ensure that the stenographer's transcription was "accurate". *State* v. *Cleveland,* 6 N.J. 316, 327-30 (1951). But at Smith's trial, his admission of "accuracy" was contorted and used for much more than this limited purpose. It was used as evidence that his answers during the Q. and A. were "accurate", i.e., truthful.

Detective de Lisle testified to the "accuracy" admission and was left virtually without cross-examination. (T. 521). The court made *no* inquiry into the voluntariness of the admission, yet it did consider the admission in denying the motion for acquittal. (T. 633). And ultimately, the court charged that the jury could consider the admission in assessing the "weight and credibility" to be given to the prior Q. and A. (T. 963). Since the court also removed the "voluntariness" of the Q. and A. from jury consideration, (T. 963), "weight and credibility" was all the jury had left to determine. In short, Smith's unwitting "accuracy"

comment was ultimately presented to the jury as a second confession reaffirming the content of the first.

With respect to the Q. and A. statement itself, some evidence on voluntariness was taken at trial. Four of those present when it was taken, testified *in the presence of the jury* that the questioning was conducted without promises, threats or coercion. (T. 516-18, 527-33. Their testimony, however, was limited to the circumstances of the Q. and A. itself, and thus dealt only with about three of the sixteen hours from arrest to the end of the statement. And these witnesses were left *entirely* without cross-examination.

Initially, defense counsel did not object to the Q. and A. as involuntary. (T. 532). But after he had a chance to read it, he did so. (T. 537). Petitioner then testified outside the presence of the jury. He did not firmly admit or deny voluntariness, although he did testify to the length and continuity of his detention, to the number of his interrogators, to the weather and his chill, to his illness, and to the little food he had eaten. (T. 539-42). The court then ruled the Q. and A. statement voluntary, and ultimately charged the jury that the court had found it so. (T. 545, 963). In deciding that the Q. and A. amounted to an admissible confession, the court relied directly upon the post-indictment "accuracy" admission, though again the court held no hearing as to the voluntariness of that acknowledgment. (T. 549).

Subsequent Proceedings and Factual Allegations

On appeal, the Supreme Court of New Jersey affirmed, expressly treating "the confession as though its introduction had been opposed upon every conceivable legal ground". *State* v. *Smith,* 27 N.J. 433, 457-58 (1958).

In 1959, after further proceedings in the State courts and this Court, petitioner filed a first petition for habeas corpus in the United States District Court.[5] Although *Massiah* v. *United States,* 377 U.S. 201 (1964), was not decided until two years later, the facts relevant to that claim (the post-indictment admission) were before the District Court. The court did not rule upon the admission, however, and without holding an evidentiary hearing,[6] it rejected all other claims that had been exhausted in State courts, including the allegation that the Q. and A. statement was involuntary. 201 F. Supp. 272 (D.N.J. 1962). It is critical to note that both court and counsel dealt with this first petition, prior to *Townsend* v. *Sain,* 372 U.S. 293 (1963), during the reign of *Brown* v. *Allen,* 344 U.S. 443 (1953), which allowed for federal evidentiary hearings, but only under narrowly limited circumstances.

The Court of Appeals for the Third Circuit thereafter affirmed the order denying the first petition. 322 F. 2d 810 (1963). Judge Ganey dissented, however, noting that in view of the evidence already obtained at the time, there was:

> ". . . no reason or motive whatsoever consonant with recognized police work for the detection of crime in the securance of the confession except . . . to compel admission of his guilt." 322 F. 2d at 819.

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[5] Strictly speaking, it was the second petition. The first was dismissed summarily, apparently for prematurity. (App. 4a).

[6] Facts relevant to whether the hearing was "waived" appear in connection with the second question presented at page 2 of this petition.

With respect to the post-indictment acknowledgment, Judge Ganey groped in advance for *Massiah*:

> "... to take this undue advantage of a youth and one unlearned in the law, in spite of his informing the detective of his counsel's advice is a shabby piece of police work this Court should not lend sanction to, or permit to go unchallenged." 322 F. 2d at 819.

After further federal and state court proceedings,[7] petitioner filed his second petition for habeas corpus in July, 1965.[8] The petition and its supplement (A. 3-83) again presented the *Massiah* issue, now by name. Petitioner also requested a *Townsend* v. *Sain* hearing on voluntariness and other issues, in light of facts not explored at trial. (A. 14-21, 58-62). These factual allegations, never tested in any court hearing, are set out in Note 12 of Judge Biggs' dissenting opinion in the court below. (App. 15a-19a). In the words of Judge Biggs, if the allegations set out be

> "contrasted with the evidence given by the witnesses at the inquiry by the Bergen County Trial Court into the voluntariness of Smith's incriminating statement, it will be observed how comparatively little evidence that Court had before it relating to the period between the time when Smith was first taken into custody by the police and the time when he gave his incriminating statement. But the period of time referred to is of vital significance in ascertaining the voluntariness of Smith's statement." (App. 14a, 15a).

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[7] See Note 1 of Judge Biggs' dissent. (App. 4a).

[8] Record references (A.) are to the Appellant's Appendix filed in the United States Court of Appeals for the Third Circuit.

Nevertheless, although no District Court had ever considered a Smith petition during the new reign of *Townsend* v. *Sain,* the court did not hold a *Townsend* hearing. Instead it denied this petition summarily upon the ground that *Johnson* v. *New Jersey,* 384 U.S. 719 (1966), precluded retroactive application of *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) and *Miranda* v. *Arizona,* 384 U.S. 436 (1966). (A. 85). The order did not mention the applicability of *Johnson* to *Massiah,* but the court subsequently denied an Application for Reconsideration which highlighted that point. (A. 86-95, 114). On appeal, the United States Court of Appeals affirmed *per curiam,* again omitting mention of *Massiah.* With respect to the *Townsend* hearing, the court held that, although *Townsend* had not been decided when the first habeas petition was pending before the District Court, the case had been presented to the Third Circuit after argument of the first appeal. Accordingly, the court concluded, *Townsend* and all other issues had been disposed of on the appeal from the denial of the first habeas petition. (App. 2a).

Judge Biggs dissented, suggesting that since *Townsend* had expanded the availability of federal habeas hearings, and was not the law available on the first petition, there was no waiver of the *Townsend* hearing. Such a hearing was now required to settle the voluntariness, *Massiah,* and other questions properly presented. (App. 19a). Judge Freedman expanded upon these views in a lengthy dissent from the denial of the petition for rehearing *en banc.* (App. 21a-24a).

Accordingly, unless this Court acts, Edgar Smith may be executed without any court ever having spoken to *Massiah* on the merits, or heard the facts surrounding the incriminating statements that convicted him.

REASONS FOR GRANTING THE WRIT

1. MASSIAH AND THE POST-INDICTMENT ADMISSION.

The Court should summarily reverse the judgment below in light of *Massiah* v. *United States,* 377 U.S. 201 (1964) and *McLeod* v. *Ohio,* 381 U.S. 356 (1965). Like petitioners Massiah and McLeod, Edgar Smith

> "was denied the basic protection of [the Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which . . . agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206.

The "incriminating words" elicited were Smith's post-indictment admission of the "accuracy" of the prior Q. and A. These words were elicited by a detective who was told by Smith that his absent lawyer had warned him against signing the confession, and who must also have known that the admission was as good as a signature for admissibility purposes. *State* v. *Cleveland,* 6 N.J. 316 (1951).

The accuracy admission had particular impact in this case, because of the treatment the trial judge gave to the prior Q. and A. Using a procedure now discarded even in New Jersey[9] the trial judge not only made a conclusive finding of voluntariness, but he informed the jury of that finding and explicitly left only "weight and credibility" open for jury consideration. He then

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[9] *State* v. *(Clarence) Smith,* 32 N.J. 501 (1960), warned trial judges not to inform juries of their findings of "voluntariness".

charged the jury that in determining the weight and credibility of the Q. and A.:

> "You take into consideration . . . the testimony of the detective that the defendant read it once and acknowledged its accuracy." (T. 963).

In truth, then, from the jury's point of view, Smith's post-indictment admission was among the most damaging statements he made.[10]

But just as the "accuracy" admission led to conviction, so it must lead to reversal, for it was elicited in violation of Smith's Sixth Amendment post-indictment right to counsel. The *Massiah* case later made that violation explicit, but as the Court noted, the *Massiah* rule "no more than reflects a constitutional principle established as long ago as *Powell* v. *Alabama*" in 1932. 377 U.S. at 205. The *Powell* principle, 287 U.S. 45, 57 (1932), as quoted in *Massiah* and violated here, is that:

> "during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself." 377 U.S. at 205.

In view of the respectable age of the principle reiterated in *Massiah*, it is no wonder that this Court has accorded that Sixth Amendment rule the retroactivity

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[10] Although there was no trial objection to de Lisle's testimony concerning the admission that is no bar to application of *Massiah*. This Court has only recently reversed a conviction, in a case tried after *Massiah*, in which no objection was made. *Beatty* v. *United States*, 389 U.S. 45 (1967); see *Beatty* v. *United States*, 377 F. 2d 181, 183, 193 (1967).

denied to the Fifth Amendment rules of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966). See *Johnson* v. *New Jersey*, 384 U.S. 719 (1966). Thus, in *McLeod* v. *Ohio, supra*, this Court summarily reversed a conviction that rested upon a post-indictment statement taken in violation of *Massiah*, even though both McLeod's statement and his trial took place before *Massiah* was decided. If *Johnson's* retroactivity bar were applicable to *Massiah*, as it is to *Escobedo* and *Miranda*, the *McLeod* conviction would have [redacted] survived.[11]

In other words, this Court has already given *Massiah* the retroactive effect to non-"final" cases accorded to the *Mapp* rule in *Linkletter* v. *Walker*, 381 U.S. 618, 622 at Note 5 (1965). Admittedly, *Linkletter* denied full retroactive effect to *Mapp* but the reasons for that limitation are inapplicable to *Massiah*:[12]

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[11] *McLeod* also makes clear that the *Massiah* rule is enforceable against the States, and that surreptitiousness in eliciting post-indictment statements is not critical to the holding in *Massiah*. In *McLeod*, the statements were knowingly made to a police officer. Even if trickery were required, however, there is more than a suggestion of it here. See text at pp. 6, 7.

[12] The ensuing analysis in the text follows the balancing test set up in *Johnson* v. *New Jersey*, 384 U.S. at 728:

> "We also stress that the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, *and the way in which these factors combine must inevitably vary with the dictate involved. Accordingly as Linkletter and Tehan suggest, we must determine retroactivity 'in each case' by looking to the peculiar traits of the specific 'rule in question'.*" (Emphasis supplied).

a. Reliance

The first *Linkletter* reason for limiting retroactivity was the justifiable reliance States had placed upon the *Wolf* case, overruled in *Mapp*. *Massiah*, however, did not overrule any decision. Indeed, the Court explicitly stated that *Massiah* "no more than reflects" the *Powell* principle, then of 32 years standing.

b. Purpose of the Rule—Reliability of the Statement

Unlike the police deterrent purpose of *Mapp*, or the purpose in *Escobedo* and *Miranda*, "to guarantee full effectuation of the privilege against self-incrimination", *Johnson* v. *New Jersey*, *supra*, at 729, the purpose of the *Massiah* rule is reflected in its reliance upon the *Powell* case and the Sixth Amendment: to ensure "effective representation by counsel at the only stage when legal aid and advice would help" the defendant. 377 U.S. 204. As in other Sixth Amendment cases (See, e.g., *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Doughty* v. *Maxwell*, 376 U.S. 202 (1964); *Hamilton* v *Alabama*, 368 U.S. 52 (1960); *Mempa* v. *Rhay*, 389 U.S. 128 (1967)), full retroactive effect should be given to *Massiah* upon the Court's established criterion—that the absence of counsel threatens "the very integrity of the fact-finding process" and presents "the clear danger of convicting the innocent." See *Johnson* v. *New Jersey*, *supra*, at 728.

Indeed, those evils come to pass here, for in the absence of counsel, petitioner, who refused to sign on advice of counsel, was led into an acknowledgement that his Q. and A. was "accurate", wholly unaware that his acknowledgment would serve in place of his signature for admissibility purposes. And, most significantly, without counsel, he had no way of knowing

that his casual comment on "accuracy" would later be used, not merely to substantiate the stenographer's transcription, but to increase dramatically the "weight and credibility" the jury would give to the prior Q. and A.[13] Under these deceptive circumstances, there can be no doubt that the *Massiah* violation undermined the "reliability" of the statement elicited, impaired the "integrity of the fact-finding process" and created "the danger of convicting the innocent." At least in such circumstances, retroactive application is required.

c. Impact on Administration of Justice

The final *Linkletter* reason was that unlimited retroactivity would work serious disruption in the administration of justice. In view of the *Wolf* rule, it was easy to predict that multitudes of cases would be affected if *Mapp* were fully retroactive. Full retroactivity for *Massiah* rule, however, presents no such threat. That rule involves only post-indictment questioning in the absence of counsel—a rare phenomenon, as contrasted with the pre-indictment settings of *Escobedo* and *Miranda*. Questioning is valid when used to identify and develop a preliminary case against a suspect. After indictment, its legitimate function is extinct. Accordingly, unless gross misbehavior be attributed to police everywhere, it must be assumed that violations of *Massiah* have rarely taken place.

More than assumption supports that conclusion. It is some index of rarity that in the four years since *Massiah* was decided, less than ten reported cases, state and federal, have presented *Massiah* claims in a "final"

[13] Counsel's presence also would have helped to guarantee that the statement of "accuracy" was itself accurately reported at trial. There was trial conflict on that point. (Cf. T. 521 with T. 674-75).

context within the meaning of *Linkletter*.[14] Consequently, the evidence strongly suggests that, in the particular instance of *Massiah's* retroactivity, the fear of impending disruption is no more than a specter. Our legal system should, by contrast, require compelling proof of an overriding evil before relying upon that evil to deny application of constitutional principles.

Accordingly, the *McLeod* reversal compels similar treatment here, for there are no countervailing *Linkletter* interests, either in terms of reliance or disruption, to justify the *Linkletter* limitation upon the retroactivity already accorded to *Massiah*.[15] Since this Court has completely considered retroactivity principles in *Linkletter* and subsequent cases,[16] the judgment

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[14] Research encompassed all State and Federal jurisdictions through cases reported in May, 1968. Only seven cases were found in which an allegation was made, in a "final" setting, that a post-indictment statement was elicited by the government in the absence of counsel. Since research of this sort is bound to overlook cases, the text reports the results as "less than ten".

The seven cases found are: *Lyles* v. *Beto*, 379 U.S. 648 (1965); *Romano* v. *Fay*, 360 F. 2d 389 (2nd Cir. 1966); *Lopez* v. *Pitchess*, 265 F. Supp. 136 (C.D. Cal. 1967); *Ex Parte Newell*, 394 S.W. 2d 175 (1965) (Tex.); *Elliot* v. *Warden*, 243 Md. 637 (1966); *Commonwealth* v. *Coyle*, 427 Pa. 72 (1967); *Raymond* v. *Rundle*, 427 Pa. 313 (1967).

[15] In *Lyles* v. *Beto*, 379 U.S. 648 (1965), this Court vacated the judgment and remanded a case that called for a fully retroactive application of *Massiah*. Presumably, *Lyles* was remanded because the Court of Appeals had decided it prior to *Massiah* and thus had no opportunity to apply *Massiah* itself. See 329 F. 2d 332 (5th Cir. 1964). On remand, the Court of Appeals held that *Johnson* governed *Massiah* and thus barred retroactive application. 363 F. 2d 503 (5th Cir. 1966). The Court failed to note the existence of *McLeod*, however, which would have alerted it to the inapplicability of *Johnson*. But no petition for certiorari was filed.

[16] See *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Johnson* v. *New Jersey*, *supra*; *Stovall* v. *Denno*, 388 U.S. 293 (1967).

below should be reversed summarily. If the issue be regarded as still unsettled, however, it is plainly of sufficient importance to warrant oral argument in this Court.

2. THE TOWNSEND v. SAIN "WAIVER".

No court has ever fully heard the facts of Edgar Smith's police detention that led to and surrounded his Q. and A. confession and post-indictment "accuracy" affirmation. His second habeas petition and supplement, involved here, called for such a hearing under *Townsend* v. *Sain,* 372 U.S. 293 (1963). (A. 4, 61). No hearing was held, however, and that denial was upheld in the Third Circuit upon a theory of "waiver" repugnant to this Court's teachings.

At the outset, it should be made clear that the events relied upon for the "waiver" took place, not in connection with this second habeas application, but in the District Court upon the first petition when *Townsend* v. *Sain* had not yet been decided. *Brown* v. *Allen,* 344 U.S. 443 (1953), which *Townsend* was later to "supersede," 372 U.S. at 312, was thus the law on the availability of federal evidentiary hearings. Under *Brown* a hearing was possible only under "uncommon circumstances". 344 U.S. at 497. At the time of the alleged "waiver", then, neither counsel nor the court regarded a hearing as "mandatory" upon the six criteria later to be laid out in *Townsend.* 372 U.S. at 313. Likewise both were unaware of the broad "discretion" that *Townsend* was to confer upon the district judge.

> "In every case he has the power constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." 372 U.S. at 318.

The factual setting needs clarification as well. The remarks of the district judge relied upon by the Third Circuit are printed in the opinion of that court so close to the remarks of counsel that it may seem as though they are parts of verbal interchange. (App. 2a-3a). In fact, the court's remarks were made on May 15, 1961. (App. 64a, 65a). Counsel's remarks were made on June 5, 1961. (App. 67a, 69a). Moreover, there is no indication whatever that counsel was responding to the court's statement made three weeks earlier.

Neither is there any clear indication that the Court's comment on May 15 was an "offer" of an evidentiary hearing.

> "THE COURT: 'Let me say this, There may have been some misunderstanding on our last discussion, but it was my thought, and I think I initiated the idea that I didn't want counsel on the side of the defendant, or the side of the state or anybody involved in this case feeling dissatisfied with the state of the record; that I wanted this record to be as complete as you thought it should be. . . . I just wanted everybody to be satisfied that they had, so far as they were concerned, this record in complete form so that here and later and wherever you may go, whoever takes the initiative of going from here to somewhere else would not be called upon to argue that this is incomplete and this matter really hasn't been heard as yet.' "

Although these words reflect the court's concern for the "state of the record", the full context discloses that the court's concern was focused upon the completeness of the petitioning papers, and not at all upon the question of an evidentiary hearing. As the parts of the transcript reprinted in the Appendix (App. 64a-67a)

show,[17] there was no explicit discussion of an evidentiary hearing. Instead the colloquy was directed to whether the case would proceed upon the original petition for habeas corpus, a supplemental petition allowed by the judge when he was assigned to the case, or both documents. Indeed, the court clarified the context in a remark that follows immediately upon the foregoing quotation:

> "[The Court]: Now that was my notion, and that is the (4) reason I think I suggested that I would allow an amended or supplemental petition, you see." (App. 65a)

Three weeks later, petitioner's counsel made the second comment quoted in the opinion below as completing the "waiver":

> "The United States Supreme Court says your Honor may hold a hearing de novo if need be to go into the historical facts behind this case. I don't think it is necessary here. I think if your Honor limits himself to the record, I think that the error, the fundamental constitutional error in this case is so overwhelming that I need not stand here and argue this case at any great length.
>
> "Now, if we understand each other, so there will be no mistake about it, we rely solely and wholly upon this amendment and supplemental petition your Honor now has before you with the exceptions that I noted at my last appearance of Exhibit C attached to the original petition, which is the excerpts of the statutes . . . With that addition, I say we rely solely upon this amended and supplemental petition . . ."

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[17] The full transcript is also part of the record. It appears in the Appellant's Appendix in the Third Circuit. (A. 121-180).

Again, the transcript of June 5 discloses that there was no "offer" of a hearing by the court. (App. 67a-69a). At most, the foregoing remark was a gratuitous addition to counsel's argument that the constitutional violation was clear.

Moreover, still later at the June 5 hearing, petitioner's counsel said:

> "Now there is one other point I would like to bring in. Mr. Brudnick still says we are restricted to this trial record. I say we are not, and I say the Rogers case now agrees with us that this Court can go beyond the trial record and it says it very plain here. As a matter of fact, the Rogers case says even if we didn't raise the voluntariness of the confession in the trial court, we can raise it here for the first time and your Honor can hold a de novo proceeding on that assuming for the sake of argument that the lawyer failed to raise the issue of voluntariness in the trial court." (App. 69a-70a).

Arguably these remarks constituted a *request* for an evidentiary hearing, but at the very least they are inconsistent with the view that petitioner's counsel had "waived" such a hearing earlier.

Accordingly, there is no factual basis for the "waiver" found by the court below. But, there is also no legal basis for that conclusion, for even if counsel "waived" something at the first habeas hearing, he could not have waived *the right to a hearing that is at stake here.* That right did not exist until *Townsend* v. *Sain* gave it life, months after the alleged "waiver." It is true that a hearing was possible under the *Brown* case, but *Townsend* so radically expanded its availability, on "mandatory" as well as "discretionary"

bases, that the actions of counsel in the pre-*Townsend* era cannot fairly bind petitioner now. In other words, at the time of the alleged waiver, the expanded right to a hearing was simply not "known" within the "classic definition of waiver . . . . 'an intentional relinquishment or abandonment of a *known* right or privilege' . . . ." (Emphasis supplied). *Fay* v. *Noia,* 372 U.S. 391, 439 (1963)

Likewise any waiver in the first proceeding cannot bind petitioner now, for his second petition presents new and substantial "voluntariness" allegations.[18] During the reign of *Brown* v. *Allen* it could properly have been believed that such allegations would not have warranted a hearing. But with the advent of *Townsend* it became fitting to present details well beyond the state court record, for they bear directly upon the "adequacy" of that record—one criterion for a "mandatory" hearing. Moreover, *Townsend* inspires the presentation of details that may persuade a court to exercise its new-found "discretion" to hold a hearing in any case.

But such detailed allegations were not before petitioner's first habeas court, which in any event had a pre-*Townsend* view of its hearing power. Likewise, they were not before the Third Circuit on the first appeal.

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[18] E.g., that he was forced to strip by two detectives who taunted him and knocked him down; that he was told his wife was being held and would be released only when he "talked". The second habeas petition (1965) contains the full set of allegations. See dissenting opinion of Biggs, J. at Note 12. (App. 15a-19a). But many have been advanced, at least in outline, by Smith since 1959. Moreover, allegations pertaining to police interference, both with access to his wife and to counsel, have consistently been urged before cases such as *Haynes* v. *Washington,* 373 U.S. 503 (1963) and *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) highlighted their legal significance.

Consequently, even though that court had available the intervening *Townsend* case, this Court must reject the argument that the *Townsend* issue was disposed of on the first appeal. For, on that appeal, the Third Circuit had before it a petition "inspired" by *Brown* v. *Allen*. Moreover, Townsend addresses itself to the specialized expertise of district judges. It is not for Courts of Appeal to exercise "discretion" in the first instance.

Finally, Smith cannot be bound by the actions of counsel because even if a "waiver" could be wrung from these facts, there is no evidence that it was "the considered choice of the petitioner". *Fay* v. *Noia*, 372 U.S. at 439. In capital cases, this rule should be strictly enforced, for it is intolerable that one man may "waive" away the life of another. In this case, any doubt concerning petitioner's participation can be resolved as a threshold matter in a *Townsend* hearing.[19]

Since such a hearing is plainly appropriate on the allegations of the present habeas application, the judgment below should be summarily reversed. A hearing is required because, as Judge Biggs noted below, if the allegations of the present application be "contrasted with the evidence given by the witnesses at the inquiry

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[19] Petitioner has never left Death Row and so was not present at the proceeding in question. The Third Circuit denied petitioner's application to expand the record with an affidavit disclaiming his knowledge that any hearing was waived. That denial may have amounted to a denial of due process in this case, because the waiver issue did not appear until after the District Court denied the petition. In a conversation, the judge informed counsel that he had decided the *Townsend* claim on that ground. But since counsel had no opportunity to contest the facts of the alleged waiver, the Court of Appeals should have permitted the affidavit and remanded for a factual hearing on the question.

by the Bergen County Trial Court . . . . it will be observed how comparatively little evidence that Court had before it" on the issue of voluntariness. (App. 14a). This case thereby calls for a "mandatory" hearing within the fifth *Townsend* category—where "the material facts were not adequately developed at the state-court hearing." 372 U.S. at 313.

It is true that some voluntariness hearing was held at trial. But the fifth *Townsend* category was explicitly designed for just that situation. That category was not meant to encompass only "newly discovered evidence," for *Townsend's* fourth category explicitly covers that. 372 U.S. 313. Indeed, *Townsend* compels a federal hearing if "for any reason not attributable to the inexcusable neglect of petitioner, ... evidence crucial to the adequate consideration of a constitutional claim was not developed at the state hearing . . . ." 372 U.S. 317.

No allegation of "inexcusable neglect" can be substantiated on this record. In *Townsend,* this Court equated "inexcusable neglect" with the "deliberate bypassing of state procedures" as defined in *Fay* v. *Noia.* And *Noia* makes clear that such a conclusion may be reached "only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default." 372 U.S. at 439. No such inquiry appears on this record, although at a subsequent *Townsend* hearing the State could attempt the relevant showing.

Likewise, the State could attempt to show that the failure to develop the facts fully at trial was a "tactical" decision sufficient to constitute a default. It is virtually inconceivable, however, that the failure was a

"tactical" choice. A decision not to raise "voluntariness" at all might have been designed as litigation strategy, but what conceivable reason would have warranted only partial development of the facts? It is much more likely that this was a case in which counsel "failed because of insufficient preparation or other neglect to marshall all crucial evidence underlying a federal claim . . . ." In that situation, "a knowing default should not be found, although counsel may have been aware both of the right at stake and of the applicable rule."[20] Sofaer and Wright, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility,* 75 Yale L.J. 895, 971.

Evidence of counsel's inadequate preparation is already on the state court record. Counsel did not initially object on voluntariness grounds. Only after reading the Q. and A. in the midst of trial did he prompt such a hearing. And even then, he left the State's witnesses without cross-examination.

The court, too, contributed to the inadequacy of the hearing. Four of the State witnesses on "voluntariness" were examined *in the presence of the jury,* a technique that may well have inhibited defense inquiry. Such a procedure has now been declared unconstitutional, *Sims* v. *Georgia,* 385 U.S. 538 (1967).

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[20] The Harvard Law Review agrees: "Thus it would seem that defense counsel's failure adequately to press a constitutional claim might be a ground for disregarding a state court determination even if it was not so serious as to amount to a denial of the defendant's right to effective assistance of counsel." Note, *State Criminal Procedure and Federal Habeas Corpus,* 80 Harv. L. Rev. 422, 425.

Accordingly, the voluntariness hearing held at trial was plainly "inadequate" and *Townsend* v. *Sain* thereby calls for a new one.[21]

3. THE Q. AND A. CONFESSION WAS INVOLUNTARY.

Examining only the state court trial record, the decisions of this Court compel the finding that Edgar Smith's Q. and A. confession was involuntary.

The Court's most recent precedent, *Greenwald* v. *Wisconsin,* 390 U.S. 519 (1968) presents a compelling analogy. Both Smith and Greenwald were arrested after 10 p.m. one evening, detained through the night, and confessed early the next afternoon. Neither had eaten since early on the day of the arrest. Indeed, Smith had not taken food since the morning, whereas Greenwald had eaten at 4 p.m. Both Smith and Greenwald went without sleep during detention, although Greenwald, but not Smith, was left alone for much of the night and thus had an opportunity to sleep.

Like Greenwald, Smith was ill during the interrogation period and both were transferred from one detention site to another. Early in the morning, Greenwald was exposed to a "lineup"; and Smith, to a medical examination. Both suspects were subject to intermittent questioning by several officers at a time.

Apart from these similarities, Smith's case is even more compelling. His periods of questioning were longer. Unlike Greenwald, he was never advised of his

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[21] At the new hearing, it would also be appropriate to raise the other claims that have not yet been adjudicated in federal habeas, see Judge Freedman's dissent below, as well as claims suggested by recent decisions of this Court, e.g., *Witherspoon* v. *Illinois,* 20 L. Ed. 776 (1968) that cannot properly be decided upon this record.

	Brown	Chambers	White	Ashcraft	Malinski	Haley	Lee	Watts	Turner	Harris	Leyra	Fikes	Payne	Spano	Blackburn	Rogers	Reck	Culombe	Gallegos	Townsend	Lynumn	Haynes	Massiah	Jackson	Escobedo	Smith
I. Denial of Rights																										
Deprivation of friend, relative or counsel (incommunicado)		x	x	x	x	x		x	x			x	x	x	x	x	x	x	x			x			x	x
No prompt preliminary hearing								x	x			x	x					x								x
Not informed of rights								x	x	x			x					x				x			x	x
Statement after indictment														x									x			x
Requested lawyer														x		x	x	x				x				#
II. Questioning																										
Extended questioning		x		x		x		x	x	x				x	x		x		x							x
Where questioned			x							x		x			x											x
Relay questioning				x		x		x	x																	x
Night (early morning) questioning		x		x		x		x	x		x			x		x		x						x		x
No. of interrogators														x	x											x
Questioning by psychiatrist											x															
Friend or relative assists in questioning														x				x								
Confession prepared by police	x														x											
III. Threats																										
Threat of harm or loss						x															x					#
Threats to others										x						x										
IV. Status of Accused																										
Youth of accused						x	x										x		x	x						
Education of accused			x							x		x	x				x	x			x					
Intelligence of accused												x	x				x	x					x			
Language barrier																									x	
Insanity															x											
Sickness of accused																		x			x			x		x
V. Nature of Coercion																										
Physical torture	x																									
Fear of mob violence		x												x												
Protracted detention			x					x	x									x	x				x			x
Denial of sleep					x			x				x														x
Slapping																										
Illegal police procedure						x		x	x								x								x	#
Stripped of clothing						x																				x
Denial of food								x	x					x				x								x
Confinement facilities			x						x																	
Promise of leniency																					x					
Accused placed in "show-up"																		x								
VI. Second confession						x						x				x	x	x		x			x	x		
VII. Special Techniques																					x			x		
Use of truth serum																										
Use of lie detector									x					x												
VIII. Previous experience with police (criminal record)													x		x			x				x	x			x

x = Facts From State Court Record
# = Allegations Added

rights and never testified that he knew of them. And unlike Greenwald, Smith, seven years younger, was "a stranger to the criminal law." 390 U.S. at 521.

Upon such a comparison, it would be plain injustice for this Court to permit Smith's confession to stand. Moreover, the accompanying chart compares the factors present in this case with those in other confession cases reversed by this tribunal.[22] That comparison, too, compels the conclusion that the judgment below must be reversed.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

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August 12, 1968

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[22] The chart is a modified version of one appearing in the *Defender Newsletter*, Vol. II, No. 5, September, 1965.